Central Law Journal.

ST. LOUIS, MO., APRIL 13, 1906.

STIPULATED DAMAGES.

The cases involving stipulated damages are legion and an effort to classify them so that any really definite or satisfactory result might be obtained, would seem next to impossible. Still there is an increasing tendency among business men to stipulate the damages by the terms of the contract itself. There seems to be no good reason why the courts should interfere and make contracts for the parties, though there has been a strong tendency heretofore to do so. There seems now to be a leaning toward supporting the provisions to be found in contracts fixing the damages, upon a default on the part of one of the parties in the performance of some particular important term or of the whole of a contract. The importance, in the business world, of having contracts as stable as possible can not be too carefully attended to by the courts. Parties certainly ought to understand what they are doing when they make them, as well as the consequences of a breach. Of course there are cases where it would be unconscionable to hold a party to what plainly appears to be a penalty for a failure unintentionally to comply with the conditions of a contract, and parties should be held only to the actual damages. But the case is different when it comes to a question of a willful breach. Where a party, by some misfortune, or after he has done all he can do under the circumstances to comply with the terms of a contract, fails to perform his part of the contract, it would be a great injustice to hold him to anything further than the actual damages. The law conceives magnificently of justice when it is consistently tempered with equity.

"The general tendency toward judicial 'expansion,' which has been a marked characteristic of recent years," says Mr. Sutherland, "has increased the uncertainty involved in this branch of the law of damages. That uncertainty was never absent, but it has become so great that it is practically, if not actually, impossible to formulate a rule which will be recognized in any considerable number of cases. While the judicial tendency to paternalism is marked, there is abundant evidence to warrant the conclusion that business men are much more inclined than formerly to stipulate their liability if there shall be a failure to perform their contracts. Why the courts are more than ever disposed to deny the same freedom of contract in this respect that is unhesitatingly recognized in other departments of business, it is difficult to say." Sutherland on Damages, 3rd Ed., Sec. 283. There can be no doubt of the truth of Mr. Sutherland's statement, and in fact there are most excellent reasons arising out of new conditions which this progressive age is producing, which make the matter of stipulated damages in contracts one to which the courts should more than ever give countenance. Mr. Sutherland goes on to say: "Notwithstanding the deplorable state of the decisions it may be assumed, first, that if, by the terms of the contract, a greater sum is to be paid upon the default in the payment of a lesser sum at a given time, the provision for the payment of the greater sum would be a penalty," which of course, could not be enforced. "Second, where by the terms of the contract, the damages are not difficult of ascertainment and the stipulated damages are unconscionable, the latter will be regarded as a penalty. Third, within these two rules parties may agree upon any sum as compensation for the breach of a contract." See Poppus v. Meager, 148 Ill. 192; Law v. Board of Redditch (1892), 1 Q. B. 127. See also 19 Cent. L. J. 282, where Mr. Elisha Greenhood has given the best exposition and the most logical arrangement of the principles of construction to be found anywhere, gathered from a mass of cases examined by him.

Just what cases fall between the two rules Mr. Sutherland mentions, is a question where the border lines may not be laid down with exactness, but there is a class of business contracts in which there are stipulations for damages in case of a breach, which the following case impliedly approved and which is illustrative of what class of cases we consider appropriately falling between the lines. It is the case of United Electric Power Co. v. Brennerman, 46 N. Y. Supp. 916, in which the plaintiff made a contract to furnish electric

current for certain stated causes, or through defendant's fault it was prevented from supplying current, certain sums should at once become due as stipulated damages. The court by Mr. Justice Daly said in part: "The complaint alleges that the defendant, by discontinuing business and removing from the premises, prevented the plaintiff from supplying the electric current according to the terms of the contracts, and thereby became immediately liable for stipulated damages computed by the rate fixed by the contracts for over a year and a half the contracts had to run. If the consumer by failing to use the light or power contracted for thereby prevents the company from supplying the current, a proposition which admits of some discussion, there remains the question whether under any fair construction of the agreement, the provision for damages applies to such nonuser as is proved in this case. Although defendant discontinued the business which he carried on in the store, he did not remove from the premises, as alleged in the complaint, for he still continued not only in possession, as owner and by his other tenant, of the building, but he used the store as a place of business, to keep his books and look after the premises, which were ready to be let, with fixtures, to a new tenant. But if the case presented the simple fact that the use of the electric current was suspended while the premises were vacant on the landlord's hands in the intervals of occupation for his own trade or by tenants, and he had the intention of resuming such use with the new occupation, if necessary, it would seem an unreasonable and far-fetched construction, which would visit on him the same penalty, which, it might with justice be claimed, would attach to a consumer who, by discontinuing business and abandoning the premises in which the company had put its plant at his request, prevented, in one sense, its supplying him with its light and power. If the defendant is liable in this case, then he could be liable to the same extent for a single day's suspension of business, even from unavoidable accident. It would be questionable whether the amounts provided as "stipulated damages" could, in such an event, be regarded other than as a penalty, so disproportionate, unreasonable and excessive would they be. It is a reasonable construction of the contract to hold that where the circumstances show, current to defendant, the agreement providing that if the plaintiff discontinued the supply of as in this case, an intentional, but temporary, suspension of the use of the electric light and power, without the intention of abandoning such use permanently, the provision for stipulated damages does not become operative, since the contract by declaring that such damages shall "become due forthwith," prevented from supplying its current, plainly intends some act on the part of the consumer which puts it out of the power of the company during the life of the contract to resume or continue his supply. * * * He was not in arrears with his payments, and had not violated its rules. The cutting off of the current to his premises by the company was therefore a breach of the contract on its part, and prevented its forcing any claim thereunder."

Such contracts as this, come within the scope of the rule laid down by Mr. Sutherland, *supra*. What the actual damages for the breach in such contracts would be, could not be certain; therefore, in view of the fact that the electric company was at large expense in being able to, and had contracted to supply it, it was reasonable to presume in case of a breach of such a contract, the damages could not be measured with any degree of certainty. The inevitable logic of the opinion in the above case is, that had there been a total failure on the part of the defendant, the penalty would have been recoverable.

In the recent case of Sun Printing & Pub. Association v. Moore, 183 U. S. 642, 22 Sup. Ct. Rep. 240, the Supreme Court of the United States seems to have checked the tendency to restrict the enforcement of such stipulations, and manifests a much greater respect for them than previous decisions. The court said: "This court has consistently maintained the principle that the intention of the parties is to be arrived at by a proper construction of the contract made between them, and that whether a particular stipulation to pay a sum of money is to be treated as a penalty, or an agreed ascertainment of damages, is to be determined by the contract, fairly construed, it being the duty of the court always where the damages are uncertain and have been liquidated by the agreement, to enforce the contract."

NOTES OF IMPORTANT DECISIONS.

WHEN AN ACT IN ITS NATURE A TORT MAY BE SUED UPON AS A BREACH OF CONTRACT.—The case of Busch v. Interborough Rapid Transit Co., 96 N. Y. Supp. 747, presents an interesting proposition on the question as to whether an act is a breach of contract or a tort. The plaintiff brought an action to recover $500, the damages alleged to have been sustained by him. He alleged that the defendant was a corporation for transportation for hire; that he was a passenger on one of its cars; that he paid his fare, in consideration for which the defendant engaged to convey him to his destination and treat him properly en route; that after he had paid his fare he entered in and upon one of the stations of the defendant and that, "the defendant, through its agents and employees, wrongfully, illegally and in violation of the terms of said contract, assaulted the plaintiff and caused one of its agents to take violent hold of this plaintiff and push, pull, maul, and otherwise maltreat him, and caused police officers to assault and arrest this plaintiff without any charge or provocation and detain him forcibly and against his will under arrest and without any warrant of law and without any cause, for the space of fifteen (15) minutes, and to assault, pull, haul, maul and push this plaintiff and derange his clothing, and caused and permitted one of its agents, in the presence of a large concourse of people, to call this plaintiff a liar and charge him with having attempted fraudulently to take passage upon one of the defendant's trains without the payment of fare and to threaten and otherwise maltreat and insult this plaintiff," which was denied by the defendant. The plaintiff established his case in the minds of the jury and the court and got a judgment for $250, and an appeal was taken to the appellate term where the judgment was reversed on the ground that the complaint stated a cause of action for assault and battery and false imprisonment and nothing else. The plaintiff was permitted to take an appeal to the supreme court. The supreme court remarked that if the defendant was right as to its being an action for assault and battery, the appellate term was right in reversing the judgment and dismissing the complaint, because the municipal court does not have jurisdiction to try actions of that character. But the court held that it was "clearly an action to recover damages for a breach of contract," The complaint alleged that the plaintiff, for the purpose of being carried in one of the defendant's cars, paid the fare required, in consideration of which defendant promised and agreed to carry him and to treat him properly, and that after he had paid the fare demanded, and entered the station where he was to take the car, the defendant, through its agents, violated the terms of "said contract" by doing certain things. "It is true," says the court, "the facts pleaded show that an assault was committed, but these facts were pleaded for the purpose of showing a breach of the contract, which was not only to transport the plaintiff safely to his destination, but to treat him properly while en route. Hart v. Metropolitan St. Ry. Co., 65 App. Div. 493, 72 N. Y. Supp. 797; Hines v. Dry Dock R. R. Co., 75 App. Div. 391, 78 N. Y. Supp. 170; Rein v. Brooklyn Heights R. R. Co., 94 N. Y. Supp. 636.

The jury having found in plaintiff's favor, the same must be accepted as true. This finding established that the plaintiff purchased two tickets and deposited the same in the ticket box provided by the defendant. When he purchased his tickets and delivered the same to the defendant by depositing them in this box and went upon the platform, that moment the relation of carrier and passenger commenced, and thereafter defendant became responsible for all consequences to the plaintiff as a passenger and was liable to him for the willful misconduct or negligence of the persons employed by it in carrying out the contract. Palmeri v. Manhattan Ry. Co., 133 N. Y. 261, 30 N. E. Rep. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632. He was just as much a passenger after he had entered upon the platform as he would have been had he entered a car. The relation was precisely the same, because he got upon the platform only by the purchase and surrender of his ticket. Gordon v. Grand St. Ry. Co., 40 Barb. 546; Webster v. Fitchburg R. R. Co., 161 Mass. 298, 37 N. E. Rep. 165, 24 L. R. A. 521; Donovan v. Hartford St. Ry. Co., 65 Conn. 201, 32 Atl. Rep. 350, 29 L. R. A. 297; 5 Am. & Eng. Enc. of Law (2nd Ed.), 488, and cases cited. Being a passenger, the plaintiff was entitled to be properly treated by the defendant's agents, and it was liable for damages inflicted by an assault of one of its servants, as well as the injury to plaintiff's feelings by the insulting language used (Gillespie v. Brooklyn Heights R. R. Co., 178 N. Y. 347, 70 N. E. Rep. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503; Palmeri v. Manhattan R. R. Co., 133 N. Y. 261, 30 N. E. Rep. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; Dwinelle v. N. Y. C. & H. R. R. Co., 120 N. Y. 117, 24 N. E. Rep. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; Stewart v. Brooklyn & Crosstown R. Co., 90 N. Y. 588, 43 Am. Rep. 185; Hamilton v. Third Ave. R. R. Co., 53 N. Y. 35; Eddy v. Syracuse Rapid Transit Co., 50 App. Div. 109, 63 N. Y. Supp. 645); and it was for the jury to say, upon all of the evidence, what the amount of such damage was. Miller v. King, 166 N. Y. 394, 59 N. E. Rep. 1114."

It is now well settled law that a passenger who is wrongfully ejected or assaulted on the train or station of a common carrier by the servants of the latter in the apparent discharge of their duty, may sue either in tort or on contract. Sutton v. Railroad Co., 101 Ga. 776, 29 S. E. Rep. 53; Chicago, etc. R. R. v. Spirk, 51 Neb. 167, 70 N. W. Rep. 926; Louisville, etc. R. R. v. Hines, 121 Ala. 234, 25 So. Rep. 857, 6 Cyc. 565. It is more usual, however, to sue in tort for the reason that usually larger damages are recoverable.

IS A PARTY TO AN ACTION IMMUNE FROM SERVICE OF CIVIL PROCESS WHILE ATTENDING COURT IN A STATE OTHER THAN THAT OF HIS RESIDENCE?

The immunity from service of civil process of a witness while attending trial in a foreign state to give evidence seems to be universally recognized. [1] The privilege protects him in coming, in staying and in returning, if he acts in good faith, and without unreasonable delay. The principle upon which the various courts have based their opinions, is derived from public policy, and the reasons advanced in support of their views relate to the free and unhampered administration of justice in the courts of the land.

An Indiana judge [2] thus ably states the reasons for the exemptions: "It is defendant's privilege, under our laws, to testify in her own behalf and this privilege should not be burdened with the hazard of defending other actions in our forums. Our own citizens will often derive substantial benefit from the personal appearance of a non-resident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other states are allowed to come into our jurisdiction to attend court as parties or witnesses, and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal appearance is often essential to enable his counsel to justly conduct his defense. The principle of state comity, too, demands that a citizen of another state, who submits to the jurisdiction of our courts, and here wages his forensic contests, should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions. It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can only come under the penalty of yielding to our jurisdiction in every action which may be brought against him, he is deprived of a substantial right, because he is willing to trust our courts and our laws without removing his case to the federal courts, or refusing to put himself in a position where a personal judgment may be rendered against him. High consideration of public policy requires that the law should encourage him to freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders."

The question as to whether a party to an action is entitled to the exemption which is given to the witness, is somewhat unsettled, and we find some conflict among the authorities. At an early date the Supreme Court of Connecticut held that the immunity from service did not apply to a non-resident party; this holding has been followed in several of the states of the Union, and might be called the "Connecticut rule." In that case [3] the defendent Vose was not a resident of the state of Connecticut but was temporarily in that state, attending court, in an action in which he was the party plaintiff; while so attending court he was served with a process in the case at bar; in overruling his motion to quash the writ, the court said: "Another question is made of a different and novel character, but which is easily disposed of. Was Mr. Vose privileged from being served with a summons, because he came here to attend the trial of a case he caused to be brought in one of our courts? We think he was not. Had he been an inhabitant of Connecticut, his attendance at court would have given him no such immunity. Why should it any more because he comes from another state? This would seem to be an additional reason why our citizens should be allowed to sue him here and bring him to trial within our own jurisdiction. At any rate he can not be placed on any better ground than our own citizens. * * * It is said again to be unjust and to involve a want of comity to foreigners when they come here of necessity to sue our citizens, who can not be found elsewhere and who have no property elsewhere, to allow them to be sued and

[1] 22 Am. & Eng. Enc. Law, 165; Andrews v. Lembeck, 46 Ohio St. 38, 15 Am. St. Rep. 547, 18 N. E. Rep. 483; Sherman v. Gunlash, 37 Minn. 188, 33 N. W. Rep. 549; Thompson's Case, 122 Mass. 428, 23 Am. Rep. 35; Person v. Grier, 66 N. Y. 124. See note to Mullen v. Sanborn, 25 L. R. A. 721.

[2] Wilson v. Donaldson, 117 Ind. 356, 3 L. R. A. 266, 10 Am. St. Rep. 48, 20 N. E. Rep. 250.

[3] Bishop v. Vose, 27 Conn. 1.

compelled to submit their causes to our courts of justice. But why is this unjust or uncourteous? We confess we do not see it. From the first it has been the law, both common law and statute law, that a foreign citizen, if found here, whether here on business or pleasure or hastening through the state with railroad speed, is liable to be sued like any other person and is not entitled to any personal or peculiar immunity. And we are at a loss to discover why our citizens should be obliged to go into a foreign jurisdiction in pursuit of their debtors, when those debtors are here and can be sued here and can receive that consideration which is meted out to all indiscriminately." [4]

In a Rhode Island case [5] which was an action of assumpsit, the defendant pleaded in abatement of the suit that, at the time of the service, he was a citizen of Boston, Massachusetts, and was in attendance upon the Rhode Island court in a suit in which he was plaintiff, and the present plaintiff was defendant. The court in sustaining a demurrer to the plea said: "The reasons assigned for exemption of non-resident suitors from the service of a summons are that courts of justice ought to be open and accessible to suitors. That they ought to be permitted to approach and attend the courts in the prosecution of their claims and the making of their defenses wi hout the fear of molestation or hindrance; that their attention ought not be distracted from the prosecution or defense of the pending suit. * * * We think that it would rarely happen that the attention of a non-resident plaintiff or defendant would be so distracted by the mere service of summons from the immediate business in hand, in prosecuting or defending a pending suit, that the interests of justice would suffer in consequence. * * * We think the reasons are fanciful rather than substantial."

In a later case in that state the court holds that a nonresident suitor attending court in the matter of his suit in which he has an interest, although he attends as a witness, is not exempt from service, but that a non-resident attending court merely as a witness is so exempt. The question as to whether the party has an interest, in the litigation, being held to be the distinguishing point. [6] Some courts make an exception in cases where the non-resident suitor comes into the foreign state to take advantage of an extraordinary remedy such as attachment and like remedies, in such cases they hold that immunity does not attach to the non-resident suitor. [7]

In a Maryland case, which was an attach ment suit, the court in holding that the non-resident suitor was not exempt from service of summons, said: "It would seem, therefore, that whatever rule of exemption we may adopt in regard to suitors generally in civil actions when the occasion arises, that neither public policy nor the due administration of justice demands that we should hold the appellee exempt from the service of the summons issued against him to compel him to answer in damage for the alleged wrongful issuing of the attachment in question. Sound public policy, on the contrary, as well as the administration of equal justice, would seem to demand that no inducements should be held out to non-resident suitors to avail themselves of the harshest remedy known to our statutes; but if they should come, and should abuse the remedy to the injury of the alleged debtor, let them answer here, as the residents of this state must do in like cases." [8]

Notwithstanding the high standing of many of the courts holding to the contrary, the weight of authority seems to be on the side of the courts who hold that non-resident parties are exempt from service in a foreign state, as well as witnesses. [9] In some states the courts have held that where a person causes a summons to be served on a non-resident suitor,

[4] In Wilson Sewing Machine Co. v. Wilson, 23 Blatch. 51, 22 Fed. Rep. 803, 51 Conn. 595, it was held that a non-resident defendant was immune from service, as his attendance was necessary both as a witness and to instruct counsel, the reason for the distinction being that a plaintiff having sought the aid of the courts of another state, ought not to shrink from being subjected to their control.

[5] Baldwin v. Emerson, 16 R. I. 304, 27 Am. St. Rep. 741, 15 Atl. Rep. 83.

[6] Capwell v. Sipe, 17 R. I. 75. In the case of Ellis v. Degarmo, 16 R. I. 715, a non-resident defendant was held to be privileged from arrest.

[7] Mullen v. Sanborn, 25 L. R. A. 721 (Md.)

[8] Mullen v. Sanborn, 25 L. R. A. 721 (Md.). See also Christian v. Williams, 111 Mo. 429, 20 S. W. Rep. 96, upholding a similar doctrine.

[9] 22 Am. & Eng. Enc. Law, 164; Thompson's Case, 122 Mass. 428, 23 Am. Rep. 370; Halsey v. Stewart, 4 N. J. L, 366; *Re* Healy, 53 Vt. 694, 38 Am. Rep. 713; Matthews v. Tafts, 87 N. Y. 568; Massey v. Colville, 45 N J. L. 119, 46 Am. Rep. 754; Fisk v. Westoner, 4 S. D 233, 46 Am. St. Rep. 780.

while the suitor is attending court that such conduct is contempt of court.[10]

In a Vermont case, one Healy, who was a resident of New York, had pending in a Vermont court a suit in the name of another person against one Howe, and Healy came into Vermont for the sole purpose of testifying in said suit, in which he was a material witness, and as such and as party plaintiff in interest he was in attendance at the trial. Within 20 minutes after Healy left the court room, Howe caused a summons to be served on him, in a suit in Howe's favor against Healy, returnable before a Vermont justice of the peace; the cause was substantially the same as in the former suit between the two parties. The court held that Howe was guilty of contempt of court, and an order of commitment was ordered made, unless he discontinue the suit which he had brought in the court of the justice of the peace. In the opinion of the higher court, Judge Veasy, in part, said: "The act of Howe would have been a plain disobedience of the order of this court if it had caused a subpoena to be served upon Healy and had given him a writ of protection. The case stands, as before shown by authorities cited, precisely the same without such subpoena and writ. The protection does not depend upon the writ. It grows out of the privilege which the law has established. It constitutes a continuing order. Moreover it has been held that punishment of a party for contempt is sometimes a remedial process to which the opposite party is entitled, though it may not be necessary for the vindication of the authority of the court. * * * While the parties were trying in this court the very issues that would be involved in the justice suit, and when Healy was here for the sole purpose of testifying in this court, Howe seized upon the opportunity to entangle him in further litigation upon the same question before another court in a distant part of the state. It is difficult to see how this would promote justice or to see any other purpose than to harass and annoy Healy. * * * Healy had a right to be here unmolested by such process not on his own account, but because the privilege is established in law, in order that courts may not be obstructed in the administration of justice."

[10] *In re* Healey, 53 Vt. 694, 38 Am. Rep. 713.

In the case of Person v. Grier,[11] summons was served upon the defendant, a resident of the state of Pennsylvania, while he was in attendance as a witness upon a trial in the state of New York. The special term set aside the summons, and the order having been affirmed by the general term, the plaintiff appealed. In affirming the order of the lower court, Judge Allen speaking for the court said: "It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo*. This rule is especially applicable in all its force to suitors and witnesses from foreign states attending upon the courts of the state. * * * This immunity is one of the necessities of the administration of justice, and courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process.

In the federal courts, the holding has been that a party going into another state as a witness or as a party under process of a court, to attend upon the trial of a cause, was exempt from process in such state while necessarily attending in respect to such trial.[12] In a Michigan case[13] where a non-resident plaintiff was served with a summons while attending court on a trial of his suit, as a party and witness therein, and for no other purpose, it was held that such service was void and might be set aside on motion. The courts have not limited their holdings to cases where parties have come from foreign states to attend at the trial of a cause in which they were interested parties, but the courts go further and hold that parties coming into a state to attend upon the hearing of a motion, or to attend at the taking of a deposition are entitled to the privilege of a suitor.[14] In the case of Moletor v. Sinnen,[15] the defendant was brought into the state of Wisconsin upon a requisition upon the

[11] Person v. Grier, 66 N. Y. 124.

[12] Brooks v. Farwell, 4 Fed. Rep. 166, following Parks v. Hotchkiss, and Juneau Bank v. McShedan, 5 Bliss, 64. See also Small v. Montgomery, 23 Fed. Rep. 707.

[13] Letherby v. Shaver, 73 Mich. 506. See Jacobson v. Hosmer, 76 Mich. 234.

[14] Wetherill v. Leitzinger, 1 Miles (Pa.), 237; Torry v. Bast, 3 W. N. C. 63.

[15] Moletor v. Sinnen (Wis.), 7 L. R. A. 817.

Governor of Illinois, having been charged with the crime of seduction. He was arraigned before a court in the state of Wisconsin and acquitted, and discharged from custody. Within ten minutes after his discharge, and before he had departed from the court room, he was served with summons, at the suit of the plaintiff, for a breach of a promise of marriage. Upon motion, the circuit court set aside the service of the summons. This action of the circuit court was the question considered on appeal, where the court said: "We think sound principle requires that, where a person has been brought within the jurisdiction of a court upon a requisition as a fugitive from justice, and has been tried for, or discharged as to the offense charged against him, that he ought not to be subject to arrest on a civil process until a reasonable time and opportunity had been given him to return to the state from which he was taken. * * * The reason for the rule that a person is exempt from arrest under the circumstances declared in this case is that sound public policy requires that a person shall be privileged from arrest while going to or from court in all judicial proceedings. The privilege should exist to subserve great public interests, and the due administration of justice."

Based upon the same principle, are holdings of the supreme court of the United States, where a person has been brought within its jurisdiction by virtue of proceedings under an extradition treaty, that such person should only be tried for one of the offenses described in such treaty, and for the offense with which he is charged in the proceedings for his extradition. Before he could be brought to trial for any other offense, a reasonable time and opportunity must be given him, to return to the country from which he was forcibly taken taken by extradition proceedings.[16] While there is some conflict among the reported cases as we have seen, as to whether a party to an action is immune from service of civil process while attending court in a foreign state, yet all agree that if such party is induced to leave the state of his residence, and go into a foreign state, by fraudulent means, then a service obtained while out of his home state will be set aside.[17] An inhabitant of a state has a right to have his controversies settled by the courts of his own government, and the law will not sustain a service which is obtained by fraudulently inducing a party to leave his home state so that the service of process might be obtained. In a Kansas case,[18] the defendants were induced to come into that state by fraud. They were then served with summons. They moved to set aside these summons and the service thereof, for the reason that it was obtained by a trick and the court held that such a process was an abuse, and could not be tolerated in any court of justice. A person desiring to claim exemption on account of being a non-resident, and being in the state as a witness or a party to an action, must show that he was in the state for the purpose of attending court, and for that alone. Hence it is held that if a person attends to other matters, or remains in the state for some time after the trial he loses his immunity from service,[19] but the rule seems to be that a reasonable time must elapse after the trial before a service can be made;[20] and that liberality is exercised in regard to the reasonableness of the time. This privilege must be taken advantage of upon the first opportunity, otherwise a neglect to do so will be deemed a waiver of such right,[21] such seems to be the weight of authority, and there is no doubt about the exemption being a more personal one, which can be waived. From a review of the authorities *pro* and *con* the following rules may be deducted.

1. The weight of authority in this country holds that a party or witness is immune from service of civil process, while attending court in a foreign state.

2. That the time over which this protection extends is during the time fairly occupied in going to and returning from the place of trial, as well as during the time when the party is in actual attendance at the place of trial.

3. That such privilege is a personal one and may be waived, and should be claimed at the first opportunity.

SUMNER KENNER.

Huntington, Ind.

[16] United States v. Bauscher, 119 U. S. 407.

[17] Townsend v. Smith, 47 Wis. 623, 32 Am. Rep. 793; Allen v. Miller, 11 Ohio St. 374; Williams v. Reed, 29 N. J. L. 385; Metcalf v. Clark, 41 Barb. 45; Wanzer v. Bright, 52 Ill. 35; Dunlap v. Cody, 31 Iowa, 260.

[18] Van Horn v. Great Western Mfg. Co., 37 Kan. 523.

[19] Smythe v. Banks, 4 U. S. 329; Finch v. Gallagher, 12 N. Y. Supp. 487.

[20] Palmer v. Rowan, 21 Neb. 452, 59 Am. Rep. 844.

[21] Fletcher v. Baxter, 2 Ark. 224; King v. Phillips, 70 Ga. 409.

MINES — CONSTRUCTION OF LEASE AS TO FAILURE TO CONSTRUCT WELL.

ZEIGLER v. DAILEY.

Appellate Court of Indiana, January 31, 1906.

An oil lease provided that, in case no well should be completed within 30 days, the grant should become void, unless the lessee should pay a specified sum annually for each year completion should be delayed. The lessee failed to complete a well within the required time, but paid for an extension, and within the period of extension sunk a well, which was worthless. After the expiration of the extension and after the death of the lessor the lessee sunk another well which produced oil, in paying quantities. Held, in a suit between the lessee and the lessor's executors, that the lease had become void and a judgment quieting title in the executors was proper.

ROBINSON, J.: On April 26, 1895, Gideon Wolf owned certain land and executed to Henry C. Zeigler the following lease: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledgd, Gideon Wolf, of Mansfield, Piatt Co., Ill., of the first part, hereby grant unto H. C. Zeigler, second party, all the oil and gas in and under the following described premises, together with the right to enter thereon at all times for the purpose of drilling and operating for oil and gas, to erect and maintain all buildings and structures, and lay all pipes necessary for the production and transportation of oil or gas. The first party shall have one-eighth part of all oil produced and saved from said premises, to be delivered in the pipe line with which second party may connect his wells, namely: All that certain lot of land situate in township of Chester, county of Wells, in the state of Indiana, described as follows, to-wit: (Describing the land, 143 acres.) To have and to hold the above premises on the following conditions: If gas only is found, in sufficient quantities to transport, second party agrees to pay first party $100 per year for the product of each and every well so transported and the first party to have gas free of cost to heat the stoves and light the jets in dwelling house. Second party shall bury all oil and gas lines, where likely to interfere with cultivation, otherwise not, and pay all damages done to growing crops by reason of burying and removing said pipe lines. In case no well is completed within 30 days from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of 143 dollars annually for each year such completion is delayed. A deposit to the credit of first party in any bank doing business in Monpelier, Indiana, will be good and sufficient payment for any money falling due on this grant. Payable quarterly in advance namely $35.75 every three months. The second party shall have the right to use sufficient gas, oil, and water to run all machinery for operating said wells, also the right to remove all its property at any time. It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, successors, and assigns." Zeigler did not complete a well within 30 days, but paid Wolf $107.25 for an extension of time for completing the well until February 26, 1896. In December, 1895, a well was drilled, but neither gas nor oil was found. The casing was withdrawn from the well, and removed from the premises, leaving the derrick, and also in the well the drive pipe. Wolf died July 16, 1896, testate, his will was probated July 21, 1896, in Piatt county, Ill., and letters testamentary were issued to John Wolf and George T. Warren, named as executors, in the will, who continued to act as such after October 18, 1899. On September 17, 1896, the will was admitted to probate in Wells county, Ind. Afterward the executors, acting under the will, caused the real estate in question to be appraised in February, 1899, and duly advertised the land and sold the same to appellees. Zeigler never paid any sum whatever as rental or otherwise under the lease, except the above sum of $107.25, and never produced any oil or gas or any other mineral under the lease from the well drilled in 1895, but the well was wholly worthless and abandoned by Zeigler as wholly worthless. Zeigler never attempted to put down any other well on the premises or under the lease prior to the summer of 1899, and never entered on the premises after the abandonment of the first well nor attempted to drill or operate thereon prior to the summer of 1899. On October 13, 1899, Zeigler without any other lease or written contract or authority so to do than the lease above mentioned, sunk and completed a well on the land in which oil was found in paying quantities. Upon these facts the court stated as conclusions of law that appellees are the owners in fee of the land, and are entitled to possession, and that they are entitled to recover costs. The judgment quieted the title to the land in appellees.

It is argued that the court erred in striking out the testimony of certain witnesses. Upon the facts found the lease, by virtue of its provisions, had either terminated before appellant sunk the well in October, 1899, or it had continued in force and was still in force on that date; and this without reference to anything the executors may have said or done at the time of the sale. It is not shown that they had any authority except to sell the land and distribute the proceeds. If the lease had terminated, they had no authority to revive it; and, if the lease was in force when the well was sunk in 1899, it was in force because it had continued in force from the time it was executed. So that it is immaterial what the executors said or did at the time the well was sunk. No act or statement of theirs was necessary if the lease was still in force, and, if it had terminated, no act or statement of theirs could revive the old lease, and it is not claimed that they undertook to make a new lease. The question is, what is the proper construction to be given the following provision: "In case no well is completed within 30 days from

this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of 143 dollars annually for each year such completion is delayed. A deposit to the credit of first party in any bank doing business in Montpelier, Indiana, will be good and sufficient payment for any money falling due on this grant. Payable quarterly in advance namely $35.75 every three months. * * * The second party shall have the right to use sufficient gas, oil, and water to run all machinery for operating said wells, also the right to remove all its property at any time." The time in which a well should be completed was postponed to February 26, 1896. by the payment of the $107.25. Within that time, in December, 1895, a well was sunk on the land, but neither oil nor gas was found, and a part of the appliances removed from the premises and the well abandoned as worthless. Appellant never paid any sum as rental or otherwise under the lease, except the $107.25, never entered upon the premises after the abandonment of the first well, and never attempted to put down any other well until the summer of 1899, a period of about three years, when he sunk and completed a second well which produced oil in paying quantities. The provisions of this lease are substantially like those in the case of Ohio Oil Co. v. Detamore (Ind. Sup.), 73 N. E. Rep. 906. In that case payments had been made extending the time for completing a well until August 28, 1897. In March, 1897, an unproductive well was drilled, and the drill and other appliances removed from the premises. No further payments were made, and no further steps taken under the contract until the spring of 1901, when a second well was drilled. This well was drilled under a proposition made by appellee that appellant would pay the back rent, $960 or more, being then due upon the basis of the old contract being still in force. No part of this payment was ever made or tendered. This well was a small producer of oil, but was abandoned in January, 1902, and all machinery and appliances removed from the premises. No further steps were taken to develop the property, and on August 12, 1902, appellee brought suit to quiet title. On August 18, 1902, pending the suit, appellant, over appellee's objection, returned to the premises and drilled well No. 3. In the opinion it is held that "the drilling of a dry hole in the spring of 1897, and then taking down the rig and removing all the machinery and other property from the premises, accompanied with the failure to pay in advance for another six months, marked the end of contractual relations between appellee and appellant's assignor," and that the arrangement made in the spring of 1901 was not a waiver of the default under the old contract, "for, the old contract having become nil, there was nothing issuing from it to waive, nor was it, strictly speaking, a rehabilitation of the old contract, but in all essential respects a new, independent parol contract," and that appellant's "rights in the land having been lost by a disregard of its obligation, or by the exercise of its option not to go on with the exploration, could not, without appellee's consent, be reclaimed by anything it did, or offered to do, subsequent to the bringing of this suit." These holdings are applicable and controlling in the case at bar.

Judgment affirmed.

NOTE.—*Construction of the Terms of an Oil Lease —A Criticism of the Opinion.*—There are so many leases of oil and gas lands being made all over the country that cases relating to them are of value even though they involve but well known principles of the law. There is nothing apparent in the record of the principal case to show that the conclusion reached by the court is not based on well known principles, so that it is hard to understand how an attorney could advise a client that he had any chance to win upon the grounds set up in the petition, so far as appears. The court says, on p. 820: "It is argued that the caurt erred in striking out testimony of certain witnesses." It is not stated what the testimony of the particular witnesses would have been, so we are left in the dark as to the really vital point in the case. In this respect it appears to us that the court clearly evades a responsibility it owed not only to the appellants but to itself. If courts are allowed to escape the responsibility of stating the facts upon which it bases its opinions and assume that they are of no consequence, there will be no way of determining whether the court gave the case that care which is due every litigant, however humble his station or insignificant the amount involved. A petition to quiet title is an action in equity and is an action *de novo* when it comes to an appellate court, and yet we have, in the opinion in the principal case, the assumption that the facts have been found, for the court says: "Upon the facts found, the lease, by virtue of its provisions, had either terminated before appellant sunk the well in October, 1899, or it had continued in force and was still in force on that date; and this without reference to anything that the executors may have said or done at the time of the sale." It yet remains very clear, that in such an opinion, it is of great importance to know what the evidence of the witnesses would have tended to establish, which the court below struck out, in order to determine whether the court came to a just conclusion. The appellate court should have reviewed the whole case, and not only not concluded that the facts were established by the conclusion of the *nisi prius* court, but set forth the ground upon which the evidence was excluded, which was the basis of the appeal.

Here was a party who had gone on to certain lands under a lease, had paid out a substantial sum of money for the right to sink a well, and whose acts could not have been regarded as having evinced an intention to wholly abandon the lease, for he left part of his property on the land and came back to continue his work, which fact is the best evidence to show that he had not abandoned the lease; who certainly thought he had some good right to go back and again endeavor to find oil, for he expends large sums, necessarily, in again sinking another well, which resulted successfully, and yet a court of equity proceeds to cut him off without a showing that it had carefully considered the facts, but assumes that the conclusion of the court below was final as to the facts, and does not show what the evidence was which was excluded,

or the ground for excluding it, all of which the appellant and the public had a right to have shown in the opinion. Such opinions are constantly appearing in many of our states, as the JOURNAL has been constantly showing. The mere fact that there are statutory enactments in regard to certain matters relative to an action does not change the nature of the action. A proceeding for a divorce is a proceeding in equity. In Gould v. Cayuga County National Bank, 86 N. Y. 83, the court said: "It is idle to say that the distinction between legal and equitable actions has been wiped out by the modern practice. It is true that all actions may be commenced in the same way; that in every form of action the facts constituting the cause of action or defense must be truly stated; that fictions in pleadings have been abolished, and that both kinds of actiors are triable in the same courts. But the distinction between legal and equitable is as fundamental as that between actions *ex contractu* and *ex delicto* and no legislative fiat can wipe it out." W. A. G.

JETSAM AND FLOTSAM.

A NEW FORM OF NEGLIGENCE.

There is no limit to the number of forms which negligence is capable of assuming, and no doubt our courts will yet have to consider forms of negligence which are at present unimagined. This week, in the case of Millins v. Garrett, a London court was asked to decide whether it is negligence to allow a dog, known to be blind, to be at large on a highway. This poor beast had upset the plaintiff from his bicycle, and his owner was sued for damages for personal injuries caused by the fall. A county court judge decided in favor of the plaintiff, but the high court reversed the decision on the ground that there was no evidence of negligence. With all respect, we submit that the opinion of the lower court was the sounder. It is not usual for dogs to bite, and therefore, if a dog of normal disposition is allowed to be at large, and does so far forget himself as to bite a passer-bye his master is not liable. But if a dog is of a peculiarly vicious disposition, and is known by his master to be likely to bite, then the master will be liable if he does bite. This is undoubtedly the law, and it seems to depend on the principle that the owner of the dog is not liable if he is not aware of any peculiarity in the dog which makes him dangerous, while on the other hand, he is liable if he is aware of such peculiarity and the dog does the damage which may be expected from the existence of the peculiarity. Now, it seems almost obvious that a blind dog must be a source of danger, both to himself and to many of the public, if he is allowed on a busy highway without guidance or control. If he is frightened, he will probably rush along without any sense of direction, and may knock down old persons, or children or persons on bicycles and cause serious injuries. If this view is right, it seems that to allow a blind dog to be at large on the highway is negligence, when the owner knows of the animal's blindness. There does not appear to be any former decision exactly in point. One of the nearest is Jones v. Owen, 24 L. T. 587, where it was held to be negligence to allow a couple of dogs to run on the highway fastened together. They had done damage by rushing along and throwing down a man by going on each side of him and catching him with the coupling chain. Here the dogs were quite harmless in disposition, but were allowed to be abroad in a condition which might cause damage. What made them dangerous, was a deliberate act of their master. In fact, it was not the dogs which were dangerous, but the dogs plus the chain. This makes a distinction between the cases, but there seems little difference in principle. In each case the negligence consists in allowing the animals to be on the highway in a condition which is likely to cause damage. If an animal is in such condition whether by the act of the owner or otherwise, he ought to be kept at home; and to allow him to be at large is (we submit) negligence.—*Solicitor's Journal.*

BOOK REVIEWS.

PATTISON'S MISSOURI DIGEST, VOL. 7.

In no other country in the world is the digesting of the current decisions of courts of last resort so carefully, exhaustively and promptly digested as in the United States of America. Every decision is promptly reported, then digested, then woven into the text of some law book or encyclopedia. This conservation of judicial opinion has done more than anything else to make the law an exact science and to prevent the different judges from overlooking previous adjudications and running after their own shifting views and inclinations. Of all classes of law books, therefore, to the lawyer in any particular state, the most important is a digest of the decisions of his own court of last resort. It is the first work for which the young lawyer spares a narrow margin of his small capital and it is the one book which is handled constantly and referred to with almost daily frequency. In states as old and as large as Missouri it is no easy task to keep one self informed of the law and its close modifications and differentiations which successive judicial utterances give rise to, so that in such jurisdictions above all others, an exhaustive digest is an absolute necessity. In this respect, however, Missouri is not lacking; for, in the digest, the seventh volume of which we have undertaken to review at this time, which Mr. Everett W. Pattison has bequeathed to the Missouri bar after a life time of conscientious, devoted, and untiring effort, that state has a digest which perpetuates with clearness, accessibility and exhaustiveness, the judicial decisions of its great courts of last resort. The seventh volume of this very superior digest is out and we have had considerable pleasure in reviewing it and in noting the increasing excellences of each successive volume. The black type headings are especially clear and arranged in a very accessible and logical classification. The type is smaller than the first volumes, but stands out with special clearness and distinctness and permits of a large increase in the amount of matter contained in the volume without increasing the size of the latter. The statements of the points digested also show wonderful care and exactness in giving expression to the real point decided. This has always been the great point of superiority of this digest over all other digests. A lawyer without his state reports could always pick up his Pattison digest and give an opinion to a client based solely on the statement of the points of law digested under the subject matter relating to the point under investigation. In many cases Mr. Pattison takes pains to set out succinctly the facts in the case before he states the decision itself. This enables the lawyer to take his Pattison digest into court with him or write a brief without consulting any other source of authority. The Missouri lawyer

who can afford to do without Pattison's digest can afford also to dispense with his office or other place of business.

One volume of 1184 pages and published by the Gilbert Book Co., St. Louis, Mo.

ABBOTT ON MUNICIPAL CORPORATIONS.

There is, perhaps, no subject of greater importance than the laws relating to Municipal Corporations. Cities are growing rapidly and are rapidly building in places where a few years ago there were but barren wastes. New conditions are forming out of the demands which ever advancing science and art are creating. A greater lattitude is being demanded of the legislatures of the states, so that municipal corporations may act with much more freedom with regard to their needs than heretofore. The signs of the times point to the probability that, the legislative grant of powers to municipal corporations will be so full, that they may do practically everything that the common sense of most of the voters within the corporate limits may dictate. Hence the importance of a thorough understanding of the laws relating to municipal corporations, and of the necessity of being up to the times. In the last six years numerous and very important decisions have been rendered with regard to the law of municipal corporations, and the last edition of Judge Dillon's great work on this subject was published in 1900. This work by Howard S. Abbott, of the Minneapolis bar, must be received cordially by the profession. The work is well done, as in fact it would need be, in order to cope with Judge Dillon's work, which has stood so long without a rival. Mr. Abbott is a Master in Chancery of the United States court and lecturer on Public and Private Corporations and Civil Law, in the University of Minnesota. The preface to this work is very modest. It announces the importance of such a work at this time. He says: "To counteract the modern tendencies of governmental agents in exercising powers other than those strictly pertaining to their character, through the construction of many public works and the ownership and maintenance of enterprises usually considered private in their nature, requires an accurate and thorough knowledge of their true character and legal capacities, the extent and character of their control over public property, their power to incur indebtedness and to issue negotiable securities, their right to own and operate public utilities, are questions of deepest public concern to every one." The learned author then calls attention to the fact that he has given particular attention to those subjects connected with the exercise of municipal powers which he regards as of the "greatest relative importance," very appropriately. The text shows that the work is done accurately and the citation of authorities is exhaustive. It is contained in three volumes. It deserves to rank with the very best of the legal works of the day, and is without doubt the most useful work upon the subject extant.

It is published by Keefe-Davidson Co., St. Paul, Minn.

BOOKS RECEIVED.

Street Railway Reports Annotated (Cited St. Ry. Rep.) Reporting the Electric Railway and Street Railway Decisions of the Federal and State Courts in the United States. Edited by Frank B. Gilbert, of the Albany Bar. Vol. III. Albany, N. Y. Matthew Bender & Company, 1906. Sheep. Price $5.00. Review will follow.

The Constitutional History of New York, from the beginning of the Colonial Period to the Year 1905, showing the origin, development, and judicial construction of the Constitution. By Charles Z. Lincoln, member of the New York Constitutional Convention of 1894, and for Six Years (1895-1900), Chairman of the Statutory Revision Commission and Legal Adviser to Governors Morton, Black and Roosevelt. In five Volumes. The Lawyers Co-operative Publishing Co., Rochester, N. Y., 1906. Price, $15.00. Review will follow.

HUMOR OF THE LAW.

This is the way the eminent lawyer, William B. Hornblower, feels on the Philippines:

A client of mine came into my office the other day looking solemn.

"What's the matter?" said I.

"My colored coachman has died and remembered me in his will," said he.

"Oh that was nice of him," I said.

"Nice, hell," said my client. "He has made me testamentary guardian of his ten minor children.—*Exchange.*

At a hearing before an Irish dispenser of justice in Pennsylvania the 'Squire stopped the proceedings and began writing industriously.

"What are you doing, 'Squire?" asked the attorney for the prisoner.

"I'm committing the man to jail," answered the 'Squire.

"But you can't do that," asserted the astonished attorney.

"I can't, can't I? and me a-doin' it," was the calm reply.—*Lippincott's.*

A recent action in a New York village before a justice of the peace was tried on a claim of damages for injuries to the plaintiff's health caused by the crowing of defendant's rooster at an untimely hour in the morning, and the consequent loss of sleep by the plaintiff. After a day spent in the swearing of witnesses on both sides the jury brought in a verdict of no cause of action. This appears to establish, so far as a village jury can do it, that a rooster, by immemorial custom, has the privilege of crowing at such hour as he pleases in the morning.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ABANDONMENT—Adverse Possession.—A perfect title passing by the commonwealth's patent is not affected by the doctrine of abandonment, unless in consequence of such abandonment adverse possession is taken by another and held for the limitation period.—Kreamer v. Voneida, Pa., 62 Atl. Rep. 518.

2. ACKNOWLEDGMENT—Irregularities.—A certificate of acknowledgment to a mortgage held not fatally defective for failure of the officer to certify that the grantor actually acknowledged the execution of the instrument to him.—Reed v. Bank of Ukiah, Cal., 82 Pac. Rep. 845.

3. ACCORD AND SATISFACTION—Acceptance Under Protest.—A receipt in full under protest for an amount less than the face of a benefit certificate held not an accord and satisfaction as a matter of law.—Mitterwallner v. Supreme Lodge Knights and Ladies of the Golden Star, 95 N. Y. Supp. 1090.

4. ACTION—Contract or Tort.—Natural gas company held entitled to maintain assumpsit for gas turned by its manager into the line of another gas company.—McCullough v. Ford Natural Gas Co., Pa., 62 Atl. Rep. 521.

5. APPEAL AND ERROR—Appeal Bond.—An objection to an appeal bond because it appeared on the face thereof that the names of two sureties had been erased was a question which should have been raised in the trial court.—First Nat. Bank v. Coles, Wash., 82 Pac. Rep. 892.

6. APPEAL AND ERROR—Assignment of Error.—An assignment of error, based on refusal to give an affirmative charge for defendant, cannot be considered in the absence of the evidence.—Louisville & N. R. Co. v. Jones, Fla., 39 So. Rep. 485.

7. APPEAL AND ERROR—Prejudice of Judge.—In a criminal prosecution, mere relationship of the judge to the prosecuting witness held insufficient of itself to require the granting of a change of venue for prejudice of the judge.—State v. Strodemier, Wash., 82 Pac. Rep. 915.

8. APPEAL AND ERROR — Rulings as Law of Case.—Charge held to have become a law of case, so that party could not, on appeal, be heard to say that the case might have been decided on theory different from that announced in the charge.—York v. New York, O. & W. R. Co., 95 N. Y. Supp. 1105.

9. APPEAL AND ERROR—Stipulation to Dismiss.—Where an appeal was dismissed under a stipulation entered into by mistake, the supreme court at the same term can recall the mandate transmitted to the trial court.—Livesley v. Johnston, Oreg., 82 Pac. Rep. 854.

10. APPEARANCE—What Constitutes.—Where property has been taken under replevin, and defendant executes a redelivey bond, it is an appearance in the action and a waiver of any defect in the summons.—Fowler v. Fowler, Okla., 82 Pac. Rep. 923.

11. BAIL—Involuntary Deposit.—Where, in extradition proceedings, accused was arrested under a warrant issued on a complaint which was insufficient to justify the issuance of a warrant, a deposit in lieu of bail to secure a release of accused was involuntary, and the depositor was entitled to recover it, though the accused did not appear.—State v. White, Wash., 82 Pac. Rep. 907.

12. BAILMENT—Implied Warranty in Letting Tents.—A lessor of tents impliedly warranted that they were reasonably suited for the uses or purposes known to be intended.—Baker & Lockwood Mfg. Co. v. Clayton, Tex., 90 S. W. Rep. 519.

13. BAILMENT—Loss of Watch While Trying on New Vest.—Proprietor of clothing store held not to have exercised proper care in guarding garment necessarily laid aside by customer while trying on a new garment, so as to be relieved from liability for its loss.—Wamser v. Browning, King & Co., 95 N. Y. Supp. 1051.

14. BANKRUPTCY—Chattel Mortgages.—A trustee in bankruptcy, suing for value of property taken by a mortgagee in a mortgage executed by the mortgagor within four months of the filing of the petition in bankruptcy, held entitled to the relief authorized by the statute.—Pfeiffer v. Roe, 95 N. Y. Supp. 1014.

15. BANKRUPTCY—Conveyance in Fraud of Creditors.—In a suit by a trustee in bankruptcy to set aside a conveyance as made in fraud of creditors, certain facts held not to show such a conveyance.—Webb v. Manheim, 95 N. Y. Supp. 1003.

16. BANKRUPTCY — Preferences. — In an action by a taustee in bankruptcy to recover a payment made by a bankrupt on the ground that it was an unlawful preference, evidence held insufficient to show that defendants had reasonable ground to believe that a preference was intended.—Wilson v. Weigle, N. J., 62 Atl. Rep. 458.

17. BANKS AND BANKING—Actions Against National Bank.—Under Rev. St. U. S. § 5242 [U. S. Comp. St. 1901, p. 3517], a state court held without jurisdiction of an action by attachment against a national bank before final judgment.—Laclede Nat. Bank v. Troy Grocery Co., Ala., 39 So. Rep. 476.

18. BENEFIT SOCIETIES—Change of Beneficiary.—A holder of certificate in a mutual benefit society held to fail to comply with the constitution relating to change of beneficiary.—Flowers v. Sovereign Camp Woodmen of the World, Tex., 90 S. W. Rep. 426.

19. INSURANCE—Increase in Amount of Assessment.—A mutual beneficiary association held not authorized to increase the assessments on a member's certificate.—Wright v. Knights of Maccabees of the World, 95 N. Y. Supp. 996.

20. BENEFIT SOCIETIES—Sick Benefits.—A beneficial association is not chargeable with interest on claims for sick benefits prior to the date demand was made therefor.—Dary v. Providence Police Ass'n, R. I., 62 Atl. Rep. 513.

21. BILLS AND NOTES—Good Faith of Purchaser.—Under Negotiable Instruments Law, § 56, one who takes a negotiable instrument with knowledge of a defect in the transferror's title is not a holder in due course.—v. Behan, Wash., 82 Pac. Rep. 884.

22. BOUNDARIES—Conflicting Calls.—Where a call for natural objects in a deed conflicted with a call for a course, and the line could be properly run according to such objects, they would prevail, and the call for the course should be disregarded.—Brockman v. Rose, Ky., 90 S. W. Rep. 539.

23. BROKERS—Purchase on Margin.—Brokers who purchased stock for a client, and afterwards delivered other stock, obtained for a smaller price, held not liable for the difference.—Helm v. Ennis, 95 N. Y. Supp. 1040.

24. BROKERS—Sufficiency of Services.—A broker under contract to procure a loan is not entitled to his commissions without proving that the loan was actually made.—Duckworth v. Rogers, 95 N. Y. Supp. 1089.

25. CARRIERS—Bills of Lading.—A carrier, even as to an innocent indorsee, held not estopped by statements in a bill of lading issued by his agents from showing that no goods were in fact received for transportation.—Swedish-American Nat. Bank v. Chicago, B. & Q. Ry. Co., Minn., 105 N. W. Rep. 69.

26. CARRIERS—Delay in Transporting Cattle.—In an action against a railroad to recover for damages resulting from delay, rough handling, etc., in transporting plaintiff's cattle, and consequent loss of market at point of destination, necessitating shipment to and sale at another market, rule as to measure of damages stated.—exas & P. Ry. Co. v. Cogg in, Tex., 90 S. W. Rep. 523.

27. CARRIERS—Failure to Properly Transport.—A rush of business is no defense for failure of a carrier to transport freight or cattle with reasonable care, diligence, and dispatch; such failure being excused only by act of God or other vis major.—Texas & P. Ry. Co. v. Felker, Tex., 90 S. W. Rep. 530.

28. CARRIERS—Liability for Baggage.—Under a passenger ticket, held, notwithstanding the baggage check and Rev. St. 1899, § 5222, a carrier was not liable for loss of passenger's baggage after it was given to the connecting carrier.—Griffith v. Atchison, T. & S. F. Ry. Co., Mo., 90 S. W. Rep. 408.

29. CARRIERS—Limiting Liability for Freight.—A common carrier may limit his responsibility for freight by notice containing reasonable restrictions, if brought home to the owner of the goods and assented to.—Gerry v. American Express Co., Me., 62 Atl. Rep. 498.

30. CARRIERS—Presumption of Negligence.—Where the shipper himself accompanies cattle to market, the rule that injuries to the cattle are presumed to have been caused by the last carrier handleing them is without application.—Texas & P. Ry. Co. v. Scoggin & Brown, Tex., 90 S. W. Rep. 521.

31. CHATTEL MORTGAGES—Conversion.—Where a chattel mortgage authorizes the mortagor to sell the property, the mere fact that a third person is in possession of the property, claiming ownership, does not show that his possession is wrongful.—Pritchard v. Hooker, Mo., 90 S. W. Rep. 415.

32. CHATTEL MORTGAGES—Rights of Creditors.—Creditors of a mortagor held entitled to compel the mortgagee to account for value of the goods taken by him under a fraudulent mortgage.—Pfeiffer v. Roe, 95 N. Y. Supp. 1014.

33. CONSTITUTIONAL LAW—Injunction.—General Laws 29th Leg. p. 372, ch. 152, authorizing the prevention by injunction at the suit of the state or any citizen of the habitual use of premises for the purpose of gaming, does not violate the constitutional guaranty of due process of law.—*Ex parte* Allison, Tex., 90 S. W. Rep. 492.

34. CONSTITUTIONAL LAW—Obligation of Contracts.—The repeal of a statute under which a license has been granted does not deprive the licensee of property without due process of law.—Littleton v. Burgess, Wyo., 82 Pac. Rep. 864.

35. CONSTITUTIONAL LAW—Right to Sue City for Personal Injuries.—The provision of the Galveston city charter, exempting the city from liability for injuries caused by defective streets, etc., held not in conflict with Const. art. 1, §§ 13, 19, when applied to an injury occurring after the adoption of the provision.—Williams v. City of Galveston, Tex., 90 S. W. Rep. 505.

36. CONTEMPT—Judgment Record.—A judgment convicting of a contempt of court is invalid unless the record of the conviction shows on its face that the matters charged were within the court's jurisdiction.—Otis v. Superior Court of Los Angeles County, Cal., 82 Pac. Rep. 853.

37. CORPORATIONS—Disposition of Assets.—Manager of a gas company cannot turn over to himself, as president of a competing gas company, the property of his employer and claim to hold adversely.—McCullough v. Ford Natural Gas Co., Pa., 62 Atl. Rep. 521.

38. CORPORATIONS—Stock Subscribers.—A subscriber to the stock of a corporation to be organized to operate a cotton seed oil mill held released where the corporation's charter authorized it to own and operate cotton gins in addition.—Comanche Cotton Oil Co. v. Browne, Tex., 90 S. W. Rep. 528.

39. COSTS—Failure to Give Security.—Where plaintiff sues under the district court procedure and fails to give security for costs, the remedy of the defendant is by special appearance and motion to quash the summons.—Fowler v. Fowler, Okla., 82 Pac. Rep. 923.

40. COUNTIES—Duty of Commissioners to Keep Minutes.—While county commissioners should keep minutes of their meetings at which they award road contracts, yet their failure to conduct their deliberations in parliamentary form does not affect the legality of a contract for the construction of a road.—Le Moyne v. Washington County, Pa., 62 Atl. Rep. 516.

41. COURTS—Jurisdiction of Appellate Court.—In order for the supreme court to have jurisdiction on the ground that the title to realty is involved, the judgment must involve such title, and a question as to the right to levy on realty is not sufficient.—Moore v. Stemmons, Mo., 90 S. W. Rep. 434.

42. COVENANTS—Warranty of Title.—In a suit by grantees in a deed against the four grantors for breach of warranty, held, that a consideration admitted by the plea to have moved to one co-warrantor was sufficient to support the warranty of all the other co-warrantors.—Tucker v. Butterweck, Fla., 39 So. Rep. 480.

43. CRIMINAL TRIAL—Argument of Prosecuting Attorney.—Statement of the prosecuting attorney in argument, that he knew of a similar case in which the death penalty was inflicted, held error, not necessarily cured by the court's instruction to disregard it.—Coleman v. State, Tex., 90 S. W. Rep. 499.

44. CRIMINAL TRIAL—Confessions.—Proof of *corpus delicti* in homicide, together with defendant's confession of complicity in the homicide, is sufficient to support a conviction.—Gallegos v. State, Tex., 90 S. W. Rep. 492.

45. CRIMINAL TRIAL—Credibility of Witness.—It is within the peculiar province of the jury in a criminal case to determine the credibility of witnesses and the weight to be given to their testimony.—State v. Smith, Mo., 90 S. W. Rep. 440.

46. CRIMINAL TRIAL—Failure to Preserve Error.—Failure to instruct on lower grades of crime than that charged held not subject to review when not called to the attention of the trial court.—State v. Urspruch, Mo., 90 S. W. Rep. 451.

47. DAMAGES—Loss of Profits.—Loss of profits in business held recoverable as damages in actions of tort, where they can be established with reasonable certainty.—Bartow v. Erie R. Co., N. J., 62 Atl. Rep. 489.

48. DAMAGES—Pleading in Wrongful Attachment Suit.—In an action for damages for the wrongful issuance of a writ of attachment, plaintiff's petition must allege a want of probable cause.—Faroux v. Cornwell, Tex., 90 S. W. Rep. 537.

49. DEATH—Evidence as to Contributory Negligence.—Less evidence is required of a personal representative as to freedom from contributory negligence of a decedent than is required in the case of a living person.—Axelrod v. New York City Ry., 95 N. Y. Supp. 1072.

50. DEATH—Pecuniary Interest.—The right of a minor sister, in the absence of a widow and child, to recover for the death of brother, rests on her dependence on him for support and expectancy of a continuation thereof.—Louisville & N. R. Co. v. Jones, Fla., 39 So. Rep. 485.

51. DEEDS—Fraud in Procuring.—Fraudulent representations by a stranger simply explanatory of the representations made by defendant held admissible, although not alleged in the complaint.—McMullen v. Rousseau, Wash., 82 Pac. Rep. 883.

52. DEEDS—Irrevocable Trust.—Deed to a mother for life and then to her children held to create an irrevocable trust in favor of the children who took a valid fee in remainder.—Sears v. Palmer, 95 N. Y. Supp. 1023.

53. DESCENT AND DISTRIBUTION—Agreement for Support of Children.—Assignment of half of income accruing from trust fund to wife, who agrees to support the children without expense to the husband, held to give the children no interest in the fund after the death of the wife.—Wright v. Leupp, N. J., 62 Atl. Rep. 464.

54. EMINENT DOMAIN—Establishment of Railroad Terminus.—The court must presume, in condemnation proceedings by a railroad, that the railroad, in building its line to a point originally fixed upon as a terminus, is acting for the purpose of serving the public.—Central of Georgia Ry. Co. v. Union Springs & N. Ry. Co., Ala., 39 So. Rep. 473.

55. EQUITY—Jurisdiction to Decree an Accounting.—The jurisdiction of equity to decree an accounting cannot be sustained merely because the bill prays for a discovery.—Daab v. New York Cent. & H. R. R. Co., N. J., 62 Atl. Rep. 449

56. ESCROWS—Substantial Compliance with Contract.—Arrangement for the payment of installments of the purchase price of stock held in escrow, and the actual payment of all sums due prior to a declaration of forfeiture, held a substantial compliance with the contract.—Boyd v. American Sav. Bank & Trust Co., Wash., 82 Pac. Rep. 904.

57. ESTOPPEL—Rights in Streets.—Persons erecting improvements in streets held not in a position to assert the city was estopped to set up rights in and dominion over the streets (Ballinger's Ann. Codes & St. § 4491).—Unzelman v. City of Snohomish, Wash., 82 Pac. Rep. 911.

58. EVIDENCE—Book Accounts.—Tablet slips of paper, containing original debit charges and credits made in the usual course of business, held admissible as books of original entry.—Lewis v. England, Wyo., 82 Pac. Rep. 869.

59. EVIDENCE—Expert Medical Testimony.—A medical expert may testify in a personal injury action that in his opinion the injury indicates permanency.—Missouri, K. & T. Ry. Co. of Texas v. Lynch, Tex., 90 S. W. Rep. 511.

60. EVIDENCE—Judicial Notice.—A court will take judicial notice that the governments of the United States and Italy are at peace.—Trotta's Adm'r v. Johnson, Briggs & Pitts, Ky., 90 S. W. Rep 540.

61. EVIDENCE—Judicial Notice as to Wearing of Watch.—It is a common knowledge of which the court may take judicial notice that men ordinarily during business hours wear their watches in their vests.—Wamser v. Browning, King & Co., 95 N. Y. Supp. 1051.

62. EVIDENCE—Opinion as to Speed of Train.—A witness who saw a train running when an accident occurred could properly be asked as to the speed of the train at the time of the accident.—Louisville & N. R. Co. v. Jones, Fla., 39 So. Rep. 485.

63. EVIDENCE—Opinions as to Value.—The knowledge of a witness as to the rental value of business lots held not to render him competent to testify as to the rental value of real estate of a different character, having no rental value for business.—Keeney v. City of Fargo, N. Dak., 105 N. W. Rep. 98.

64. EVIDENCE—Speed of Street Car.—A witness who does not know the ordinary rate of speed of a street car on a particular route is not competent to testify that a car on a particular occasion on that route was run at an extraordinary rate of speed.—Verrone v. Rhode Island Suburban Ry. Co., R. I., 62 Atl. Rep 512.

65. EVIDENCE—Weight and Sufficiency.—The court in weighing the testimony of an interested party is not bound to accept his statements, even though uncontradicted, if they do not bear the stamp of credibility.—Keene v. Behan, Wash., 82 Pac. Rep. 884.

66. EXCEPTIONS, BILL OF—Motion in Arrest of Judgment.—An appeal pending a motion in arrest held premature, so that the trial judge could not be compelled by *mandamus* to permit the filing of a bill of exceptions.—State v. Ryan, Mo., 90 S. W. Rep. 418.

67. EXECUTORS AND ADMINISTRATORS—Grant of Letters.—Where administration has been granted to petitioner and another, a joint administration is not necessary, but letters should be issued to those who qualify.—*In re* Ireland's Estate, 95 N. Y. Supp 1079.

68. EXECUTORS AND ADMINISTRATORS—Vacating Sale Made by Administrator.—Administrator's sale set aside, because purchaser did not get a building which he had reason to believe was covered by the sale.—Biddison v. Aaron, Md., 62 Atl. Rep. 528.

69. EXEMPTIONS—Earnings.—Earnings of a judgment debtor held not exempt from seizure in supplementary proceedings under Code Civ. Proc., § 2463, where it did not appear that they were necessary for the use of his family.—Seeley v. Connors, 95 N. Y. Supp. 1109.

70. FALSE IMPRISONMENT—Searching Customer Suspected of Stealing.—An agent or employee about an ordinary business has no implied authority to arrest and search customers, suspected of stealing, in the store of his principal.—Bernheimer Bros. v. Becker, Md., 62 Atl. Rep. 526.

71. FIRE INSURANCE—Insurable Interest.—The holder of the legal title subject to the rights of a buyer to acquire title by performance of a contract of sale has an insurable interest.—Brunswick-Balke Collender Co. v. Northern Assur. Co., Mich., 105 N. W. Rep. 76.

72. FRAUDULENT CONVEYANCES—Failure to Record Sale.—The failure to record a contract actually transferring property either as a chattel mortgage or as a bill of sale held not to effect the rights of subsequent creditors with knowledge thereof.—Montesano Nat. Bank v. Graham, Wash., 82 Pac. Rep. 881.

73. FRAUDULENT CONVEYANCES—Parent and Child.—Parents held entitled to receive pay or take security from son in the absence of fraud, though the result will be to delay or defeat his other creditors.—First Nat. Bank v. Brubaker, Iowa, 105 N. W. Rep. 116.

74. FRAUDULENT CONVEYANCES—Sales in Bulk.—A sale of property belonging to a livery stable business held no a sale of goods, wares, and merchandise, within the sales in bulk law (Laws 1901, p. 222, ch. 109).—Everett Produce Co. v. Smith Bros., Wash., 82 Pac. Rep. 905.

75. FRAUDULENT CONVEYANCES—Sales in Bulk.—Payees of notes given to secure a loan to be used in a business held estopped to proceed against the purchasers of the business, though no statement of debts was made at time of sale.—First Nat. Bank v. Coles, Wash., 92 Pac. Rep. 892.

76. GAMING—License.—License to conduct games of faro and roulette held a mere permit, and is not a contract, and does not convey any vested right.—Littleton v. Burgess, Wyo., 82 Pac. Rep. 864.

77. GOOD WILL—Sale of Business.—A transfer of a business procured by a buyer thereof held a transfer of a covenant on the part of the seller not to engage in such business.—American Ice Co. v. Meckel, 95 N. Y. Supp. 1060.

78. HABEAS CORPUS—Breach of Conditions of Pardon.—The proceedings to test the question whether there has been a violation or noncompliance with the condition of a pardon may properly be had on *habeas corpus* brought by the convict to test the validity of his arrest by the sheriff for an alleged violation of his pardon.—*Ex parte* Alvarez, Fla., 39 So. Rep. 481.

79. HABEAS CORPUS—Powers of Court.—On an application for a writ of *habeas corpus* for the discharge of the petitioner found guilty of contempt, the court has no authority to set aside the order which had been disobeyed.—*Ex parte* Depue, 95 N. Y. Supp. 1017.

80. HAWKERS AND PEDDLERS—License Taxes.—One soliciting orders for goods as an employee held not subject to the license tax imposed on peddlers.—State v. Smithart, Iowa, 105 N. W. Rep. 128.

81. HIGHWAYS—Grant of Franchise.—Power to grant a franchise to lay and maintain water pipes under a public highway must be derived from the legislature, and cannot be implied.—State v. Town of Monroe, Wash., 82 Pac. Rep. 888.

82. INDICTMENT AND INFORMATION—Election Between Counts.—It is not error for the court to refuse to compel an election between counts of an information relating to the same transaction, and charging the same offense.—State v. Williams, Mo., 90 S. W. Rep. 448.

83. INJUNCTION—Boycott.—The mere fact that the constitution of an association of undertakers and liverymen contains clauses, the obedience of which would result in a boycotting of complainant, did not entitle him to an injunction.—Van Der Plaat v. Undertakers' & Liverymen's Assn. of Passaic County, N. J., 62 Atl. Rep. 453.

84. INJUNCTION—Enforcement of Negative Covenant in Lease.—A court of equity will enforce by injunction a negative covenant by the lessor not to lease adjoining

premises for carrying on a competing business.—Waldorf-Astoria Segar Co. v. Salomon, 95 N. Y. Supp. 1053.

85. INJUNCTION—Gambling House.—A gambling house is, under the statute, a nuisance, and may be enjoined at the instance of any one injured thereby.—*Ex parte* Allison, Tex., 90 S. W. Rep. 492.

86. INJUNCTION—Persons Liable.—Where a strike had been declared against complainants by labor unions, in a suit to restrain interference with the business, held proper for the chancellor to deal with each defendant as an individual.—Murphey & Mundy v. Terrell, Miss., 39 So. Rep. 477.

87. INJUNCTION—Restraining Commission of Crime.—It is competent for the legislature to authorize the issuance of an injunction the effect of which is to restrain the commisson of a crime.—*Ex parte* Allison, Tex., 90 S. W. Rep. 492.

88. INJUNCTION—Restraint of Criminal Proceedings.—Conceding that equity will restrain a criminal prosecution under a void statute, it will not try the validity of the statute.—Littleton v. Burgess, Wyo., 82 Pac. Rep. 864.

89. INTOXICATING LIQUORS—Keeping Saloon Open on Sunday.—The unexplained fact of a saloon being open on Sunday in violation of Rev. Pol. Code, § 2847, is sufficient to justify a conviction of the keeper thereof.—State v. Grant, S. Dak., 105 N. W. Rep. 97.

90. INTOXICATING LIQUORS—Unlawful Sale.—Where defendant hired another to sell liquor in local option territory, an indictment against defendant for a sale made by the employee properly charged that defendant made the sale.—McGovern v. State, Tex., 90 S. W. Rep. 502.

91. JUDGMENT—Partnership Accounting.—In partnership accounting in which defendants were ordered to transfer shares of stock to plaintiff, it was proper for the judgment not to direct transfer of any specific shares.—Reilly v. Freeman, 95 N. Y. Supp. 1069.

92. JUDGMENT—Petition to Vacate.—A petition to vacate a judgment for fraud must be verified, and set forth the judgment, the facts constituting the fraud, and fully state the facts constituting the defense.—Thompson v. Caddo County Bank, Okla., 82 Pac. Rep. 927.

93. JUDGMENT—Res Judicata.—A judgment in a suit on an account by defendant against plaintiff held not *res judicata* of plaintiff's right to recover alleged noncredited payments not pleaded as a set-off in such action.—Selber v. Johnson Mercantile Co., Tex., 90 S. W. Rep. 516.

94. LARCENY—Instructions.—In a prosecution for burglary and larceny, an instruction held not objectionable for failure to require the "taking" to have been without the consent of the owner of the property.—State v. Speritus, Mo., 90 S. W. Rep. 459.

§ 95. LIFE ESTATES—What is Income.—Surplus and undivided profits on sale of bank stock belonging to estate held to belong to the life tenants and not to remaindermen, and to be properly credited to income.—*In re* Stevens, 95 N. Y. Supp. 1084.

96. LIMITATION OF ACTIONS—Pollution of Water Courses.—In an action for the pollution of a watercourse, it was error for the court to refuse to charge that plaintiff could not recover damages to him or to his land for more than a year prior to the bringing of the suit.—Tutwiler Coal, Coke & Iron Co. v. Nichols, Ala., 39 So. Rep. 762.

97. LIS PENDENS—Application of Doctrine.—The doctrine of *lis pendens* does not apply to a conveyance made prior to the service of citation in a suit on account of which the doctrine is sought to be invoked.—Sparks v. Taylor, Tex., 90 S. W. Rep. 485.

98. MALICIOUS PROSECUTION—Exemplary Damages.—Malice and want of probable cause must concur in order to authorize a recovery for exemplary damages for wrongful issuance of a writ of attachment.—Faroux v. Cornwell, Tex., 90 S. W. Rep. 537.

99. MALICIOUS PROSECUTION—Probable Cause.—One who sues out an attachment maliciously and without probable cause may be subjected to exemplary damages.—Faroux v. Cornwell, Tex., 90 S. W. Rep. 537.

100. MASTER AND SERVANT—Independent Contractors.—A principal is liable for the acts of an independent contractor employed by him where the work to be done is intrinsically dangerous, however skillfully performed.—Montgomery St. Ry. Co. v. Smith, Ala., 39 So. Rep. 757.

101. MASTER AND SERVANT—Injuries to Servant.—The state as an employer, is bound to use reasonable care in providing one in its service in the operation of a pile driver with machinery and appliances reasonably safe and suitable for his use, and to keep such machinery and appliances in repair.—Hazzard v. State, 95 N. Y. Supp. 1103.

102. MASTER AND SERVANT—Injury to Servant.—In a suit to recover for the death of an employee by the negligent operation of defendant's train, objections to evidence as to a road crossing the railroad track where the accident happened, and as to whether the engineer whistled, held properly overruled.—Louisville & N. R. Co. v. Jones, Fla., 39 So. Rep. 485.

103. MASTER AND SERVANT—Laborer's Lien.—In replevin for a bale of cotton, devolving burden of proof on the laborer claiming the same under a laborer's statutory lien that the bale was not embraced in a certain trust deed held not error.—McCarty v. Key, Miss., 39 So. Rep. 780.

104. MONEY RECEIVED—Sufficiency of Evidence.—In assumpsit for money had and received under an agreement to invest it, the evidence considered, and held not to sustain a judgment against one of the defendants.—Brady v. Messler, R. I., 62 Atl. Rep. 511.

105. MUNICIPAL CORPORATIONS—Defective Sidewalks.—In an action against a city for injuries to a pedestrian from a defect in a sidewalk, it was proper to admit evidence that the sidewalk on each side of the street and adjoining the point where the injury occurred was defective.—City of Rockwall v. Heath, Tex., 90 S. W. Rep. 514.

106. MUNICIPAL CORPORATIONS—Duty of Pedestrian.—It is not the duty of a traveler in a public street to ascertain whether or not the way is clear, though it is his duty after ascertaining that there is an obstruction to exercise ordinary care to avoid injury.—Montgomery St. Ry. Co. v. Smith, Ala., 39 So. Rep. 757.

107. MUNICIPAL CORPORATIONS—Injunction to Restrain Levy of Assessment.—Injunction is the proper remedy to restrain officers of a municipal corporation from levying assessments for public improvements under an alleged unconstitutional statute.—Arnold v. City of Knoxville, Tenn., 90 S. W. Rep. 469.

108. NEGLIGENCE—Standing on Running Board of Street Car.—It is not negligence *per se* for a passenger on a street car to stand on the running board and hold the post or handle affixed thereto, where the car is so filled that there is no room inside.—Verrone v. Rhode Island Suburban Ry. Co., R. I., 62 Atl. Rep. 512.

109. PARDON—Procedure by Indictment.—In the absence of statute, and unless the act constituting the violation of a condition of a pardon is itself a criminal offense, the violation of the condition is no ground for prosecution by indictment.—*Ex parte* Alvarez, Fla., 39 So. Rep. 491.

110. PARENT AND CHILD—Support of Child.—Agreement between husband and wife for support of children by the latter held not to affect the husband's duty, as between himself and the children, to support the children.—Wright v. Leupp, N. J., 62 Atl. Rep. 464.

111. PAYMENT—Evidence.—In an action on a book account, checks given by the debtor and accepted by the creditor held to relate to other transactions, and not to constitute a payment of the account.—Lewis v. England, Wyo., 82 Pac. Rep. 869.

112. PAYMENT—Presumption from Lapse of Time.—A lapse of 24 years in the presentation of a certificate of deposit for payment, with evidence of payment, raises a presumption thereof.—Rosenstock v. Dessar, 95 N. Y. Supp. 1064.

113. PRINCIPAL AND AGENT—Power of Attorney as Surviving Deceased.—In order that a power of attorney

shall survive the death of the principal, it must be given on consideration, and there must be vested in the donee some estate, right, or interest in its subject-matter.—Hoffman v. Union Dime Sav. Institution, 95 N. Y. Supp. 1045.

114. PRINCIPAL AND SURETY—Effect of Extension of Note.—That the holder of a note indulges the maker in enforcing collection held not to release the sureties where there is no binding contract to extend the note.—Titterington v. Murrell, Tex., 90 S. W. Rep. 510.

115. RAILROADS—Establishment of Terminus.—Where a railroad projects an extension to a certain terminal point, it is not necessary that it should own property at that point in order to make its terminus there.—Central of Georgia Ry. Co. v. Union Springs & N. Ry. Co., Ala., 39 So. Rep. 473.

116. RAILROADS—Stock Killed on Track. — A railway company is not liable in damages for stock killed on its tracks in a county in which the stock law has been adopted, in the absence of negligence in the operation of the trains killing the stock.—Missouri, K. & T. Ry. Co. of Texas v. Tolbert, Tex., 90 S. W. Rep. 508.

117. RECEIVING STOLEN GOODS—Description of Stolen Property.—An indictment for receiving stolen goods, which describes the stolen property as "two cases containing thirty-five pairs of shoes," includes the shoes in its description of the stolen property, and not merely the boxes.—State v. Sakowski, Mo., 90 S. W. Rep. 435.

118. REGISTER OF DEEDS — Liability on Bond. — The measure of liability on the bond of a recorder of deeds for negligently permitting a trust deed to be falsely marked "Satisfied" cannot exceed the amount due on the trust deed at the date of the entry of satisfaction.—State v. Green, Mo., 90 S. W. Rep. 403.

119. SHERIFFS AND CONSTABLES—Failure to Pay Over Money.—Termination of the office of sheriff without his paying funds into court held not to constitute a breach of his bond.—State v. O'Neill, Mo., 90 S. W. Rep. 410.

120. SHERIFFS AND CONSTABLES—Wrongful Suing Out of Attachment.—A constable levying a writ of attachment is not liable with the attachment plaintiff for the wrongful suing out of the writ in the absence of any evidence to show that the officer participated in the procurement of the writ.—Faroux v. Cornwell, Tex., 90 S. W. Rep. 537.

121. STREET RAILROADS—Risk Assumed in Standing on Running Board.—A passenger on a street car, who stands on the running board of the car, assumes only the risk of the ordinary motion of the car.—Verrone v. Rhode Island Suburban Ry. Co., R. I., 62 Atl. Rep. 512.

122. TAXATION—Proceding to Set Aside Assessment.—A proceeding, under Rev. St. 1892, § 1542, to have an assessment declared illegal, will not extend to irregularities in publishing notices preliminary to calling an election for a subdistrict school tax.—Louisville & N. R. Co. v. Board of Public Instruction for Jackson County, Fla., 39 So. Rep. 480.

123. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—A geographical name which has long been used to indicate a particular manufactured article may acquire a secondary meaning as the designation of a particular class of such articles, and thus become entitled to protection as a trade-mark, or serve as the basis of a proceeding to prevent unfair competition.—W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co., Me., 62 Atl. Rep. 499.

124. TRESPASS TO TRY TITLE—Wrongfully Rejected Application.—Where, in trespass to try title to school lands, plaintiff claimed as a purchaser, and introduced in evidence an application to purchase which had been indorsed "Rejected," it was incumbent on plaintiff to show that the application was wrongfully rejected.—Knapp v. Patterson, Tex., 90 S. W. Rep. 163.

125. TRIAL—Action by City to Recover Taxes.—In an action by a city for taxes, an objection to the manner in which the assessment rolls had been prepared should have been made to their introduction in evidence, and not to the testimony of the assessor, identifying the rolls.—City of Houston v. Stewart, Tex., 90 S. W. Rep. 49.

126. TRIAL—Delay in Transportation of Cattle.—The words "proper time," in an instruction in an action against a carrier for unreasonable delay in the delivery of cattle, held to mean "reasonable time."—Missouri, K. & T. Ry. Co. of Texas v. Stanfield Bros., Tex., 90 S. W. Rep. 517.

127. TRIAL—Effect of Instructions as a Whole.—It is not necessary that all of the instructions should direct the jury to the evidence in the case, where this is done by the instructions taken as a whole.—Logan v. Field, Mo., 90 S. W. Rep. 127.

128. TRIAL—Exclusion of Witnesses.—A witness, disobeying the order excluding witnesses during the trial of a criminal case, held properly allowed to testify.—State v. Ilomaki, Wash., 82 Pac. Rep. 873.

129. TRIAL—Findings of Court.—A finding that a specified sum will compensate one for a personal injury held to mean the amount necessary to compensate him as fixed by Civ. Code, § 3333.—Griffin v. Pacific Electric Ry. Co., Cal., 82 Pac. Rep. 1084.

130. TRIAL—Right to Close Argument.—Defendant held not to have acquired the burden of proof with right to close the argument by admitting ordinary negligence where gross negligence was charged.—Southern Ry. Co. in Kentucky v. Steele, Ky., 90 S. W. Rep. 548.

131. TRUSTS—Advances.—Testamentary trustees held to have had authority to give a mortgage to secure advances with which to make a settlement with contestants of the will.—Fidelity Trust Co. v. Hawkins, Ky., 90 S. W. Rep. 249.

132. TRUSTS—Assent of Trustee.—The assent of the trustee is not essential to the validity of a trust instrument.—Wells v. German Ins. Co., Iowa, 105 N. W. Rep. 123.

133. TRUSTS—Delivery of Bank Book as Passing Deposit.—Delivery of a bank book will not pass title to moneys on deposit for the purpose of a proper burial and the saying of masses, unless delivered with that intent.—Hoffman v. Union Dime Sav. Institution, 95 N. Y. Supp. 1045.

134. TRUSTS—Validity.—Relations between parties to a trust deed held not fiduciary, and there was no ground such as to warrant a setting aside of the deed.—Kelly v. Ashforth, 95 N. Y. Supp. 1004.

135. VENDOR AND PURCHASER—Purchaser's Duty on Notice of Equitable Right.—Purchasers of land must account to equitable title holder for so much of the purchase money as remains unpaid when they received notice of the latter's rights.—Sparks v. Taylor, Tex., 90 S. W. Rep. 485.

136. VENDOR AND PURCHASER—Specific Performance.—Where, in an agreement to convey land, no time is fixed in which the conveyance is to be made, the grantor has a reasonable time in which to make it.—White v. Poole, N. H., 62 Atl. Rep. 494.

137. WATERS AND WATER COURSES — Pollution of Stream.—In an action for pollution of a water course, evidence that fish had decreased in the stream, and that dead fish had been discovered therein, held admissible.—Tutwiler Coal, Coke & Iron Co. v. Nichols, Ala., 39 So. Rep. 762.

138. WITNESSES — Impeachment. — Though a witness has testified to immaterial matter, no question can be asked in regard to it for the purpose of impeachment.—Louisville & N. R. Co. v. Quinn, Ala., 39 So. Rep. 756.

139. WITNESSES—Impeachment of Accused.—An accused might be impeached on cross-examination by showing that he had been charged before a justice of the peace with passing counterfeit money, and that he was then under bond to await the action of the grand jury.—Childress v. State, Tex., 90 S. W. Rep. 30.

140. WITNESSES—Larceny.—In a prosecution for cattle theft, refusal of the court to permit defendant to ask a witness concerning a conversation had between himself and defendant as to certain cattle, on cross-examination, held error.—State v. Strodemier, Wash., 82 Pac. Rep. 915.